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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

ON APPEAL FROM THE

Circuit Court of Appeals for the Second Circuit.

OCTOBER TERM, 1905.

No. 180.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co.,

Appellant,

against

EMMA B. DRESSER,

Appellee.

BRIEF FOR APPELLANT.

GEORGE H. GILMAN,
of Counsel for Appellant,
67 Wall Street,
New York City.

B. H. TYRREL, PRINTER, 203-9 FULTON STREET, NEW YORK CITY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWARD B. WHITNEY, as Trustee in bankruptcy of Dresser & Co., Appellant, *vs.* EMMA B. DRESSER.	No. 180.

Appeal from the United States Circuit Court of Appeals, Second Circuit.

Brief for Appellant.

The decree appealed from affirmed an order of the District Court, which in turn affirmed an order of Stanley W. Dexter, Esq., Referee in Bankruptcy, allowing the appellee's claim for $88,145 against the *partnership estate* of Dresser & Co.

The appellant concedes that her claim is good as against the *individual estate* of Daniel LeRoy Dresser, one of the partners.

This appeal is taken upon a certificate of a Justice of this court under the Bankruptcy Law, § 25 *b* 2.

Statement of the Case.

Bankruptcy Form No. 56, prescribed by this court, directs that the referee's certificate should "state *the question, a summary of the evidence* relating thereto, and the finding and order of the referee thereon". "The question" to be certified is a question which "arose pertinent to the said proceedings."

The order of the referee in the present case is an order dismissing the trustee's objection to an amended proof of claim (p. 18).

The question is stated by the referee as follows:

> The verified amended proof of claim filed by claimant is on its face *prima facie* proof of the indebtedness of Dresser & Co. to claimant and the testimony taken herein is insufficient to rebut such proof.
>
> The foregoing is certified to the District Judge for his opinion.

The evidence is not summarized as required by the form, but is inserted *in extenso*.

The claimant, Emma B. Dresser, is the wife of one of the bankrupts (p. 11, top).

Prior to the election of the trustee she had filed

a proof of claim, which had been objected to; and thereafter the trustee filed verified objections thereto (p. 17, foot). The original claim was that she had loaned her husband certain securities which had been deposited as collateral for loans, the proceeds of which loans were turned over to the firm of Dresser & Co. The only one of the trustee's objections which is now of importance is objection V, that the securities were loaned to him individually and not to the firm, and that she is not entitled to prove against the firm or participate in its assets until all of the firm creditors have been first paid in full (p. 6).

The referee permitted an amendment of the claim, which amendment was filed March 3, 1904 (pp. 17-18). On the same day the claimant served notice upon the trustee for "a hearing on the objection on March 7" (p. 18, top); thus assuming that the objection to the original claim stood as an objection to the amended claim. The hearing was had on March 7 pursuant to this notice (p. 18). It has been conceded that the objection to the original claim stood as applicable to the amended claim (p. 21)—a necessary concession in view of the procedure above stated.

The amended claim is for $88,145, and is based upon the following allegations (pp. 2-4):

That prior to May 1896 the claimant loaned the firm of Dresser & Goodrich certain securities.

That said securities were deposited by Dresser

& Goodrich as collateral for loans to them.

That about said date the bankrupt Daniel LeRoy Dresser took over the assets of said firm and assumed its liabilities, including the liability of this claimant. That the assumption of this liability to her was made with her knowledge and consent; *and that the proceeds of the loans for which the securities had been deposited as collateral were turned over to him and used by him in his business.*

That about May, 1897, the present bankrupt firm was formed by said Daniel LeRoy Dresser and one Charles E. Reiss under the firm name of Dresser & Co., "said partnership succeeding to the said business of said Daniel LeRoy Dresser taking over all his assets and assuming all his liabilities, including deponent's said claim against him." That at the request of said new firm and with her knowledge and consent his liability "for a return of said securities to deponent was assumed by said Daniel LeRoy Dresser and said Charles E. Reiss, composing the firm of Dresser & Co., and used by said firm in its business."

There is no averment here, like that above italicized, that the proceeds of the prior loans were turned over to the new firm.

The amended proof of claim then, after stating the securities pledged and their value, proceeds to state "That the amounts of *the loans* for which the securities of deponent *were* deposited as collateral are as follows" setting forth the names of the creditors and the amounts of the loans, *but not their dates.* The only loans to which the reference is applicable are those to Dresser & Goodrich, as aforesaid.

The balance of the proof of claim it is unneces-

sary to set forth because it relates only to the amount, which is conceded; the only dispute being, as above stated, whether the claim is one against the firm or against the individual estate.

Judge Coxe in his opinion interprets the claim as stating that "the bankrupts took them [the securities], obtained money thereon which they used in their business, and agreed to return them to the claimant"; and "There is some obscurity in the allegation that the money derived from the loans was turned over to the bankrupts, but it is evidently due to a clerical omission and is not fatal to a document which need not necessarily conform to the strict rules of pleading" (p. 24). Having thus supplied an averment, he treated it as evidence which, the trustee not having foreseen and met it, established the claimant's case. The trustee believes that the claimant omitted the averment because she could not honestly make it; but this is perhaps as speculative as the learned judge's treatment of the matter.

Judge Coxe also refers to the trustee as having "assumed the burden" (p. 22, foot) as if in some way the trustee had waived his contention that the burden of proof was upon the claimant. The referee's certificate shows that he did not understand that claim to be waived, although the trustee introduced some evidence. It was not claimed by the appellee before the referee or before the District Court or the Circuit Court of Appeals that the question thus certified was not a question properly in the case; and it was in fact argued and decided by the Circuit Court of Appeals upon its merits, and not disposed of upon any technicality.

The trustee, while not waiving his contention that the burden of proof was upon the claimant, went as far as he could without calling either the claimant herself or one of the members of the bankrupt firm. He called as witnesses officers of three of the four corporations with which the claimant's securities had been pledged, and put in by stipulation the facts with relation to the fourth. It appeared by this testimony that every one of the loans upon this collateral was made to Daniel LeRoy Dresser individually, and that the loans were evidenced by his individual promissory notes, upon none of which notes was the firm a party. These notes appear in the record as follows:

United States Mortgage & Trust Company (pp. 12-13).

American Exchange National Bank (p. 14).

Trust Company of the Republic (p. 15).

Dime Savings Bank of Waterbury (p. 16).

The earliest date of any of these transactions was August 9, 1897.

It indeed appears that the American Exchange National Bank held also three small notes made by the firm to the order of Dresser and subsequent to the loan, and that it claimed to hold these securities as collateral to "the liability *of Dresser as endorser* on the three $5,000 notes" (p. 14, foot); but it is not attempted to be shown that there was any basis for this claim, and it is not claimed that they could be used as collateral for the liability of the firm as makers.

It also appears that the United States Mortgage & Trust Company note (made February 13, 1903) was given as a renewal of the previous note; that the latter note secured a loan evidenced by a check of $35,000 to Dresser's individual order; and that this check had been endorsed by him to his firm and deposited in its account. No attempt was made (although the facts were of course known to the claimant's husband) to show that the firm was in any way liable, even to him.

The trustee having thus proved *that all of the loans obtained upon the claimant's securities were obtained by Dresser individually and upon his own individual obligations,* rested. The assumption of the Court of Appeals that the bankrupts took the securities, obtained money thereon, and used it in their business, is without support and is contrary to the undisputed evidence.

Specification of Errors.

The assignment of errors is to be found at p. 27. We contend that the District Court in sustaining the referee's ruling erred in that it allowed the claim of Mrs. Dresser; in that it did not adjudge that her proof of claim was insufficient upon its face; in that it did not adjudge that an issue was raised as to which the burden of proof was on the claimant; and in that it did not adjudge that the *prima facie* effect of the proof of claim was met by the testimony offered on behalf of the trustee.

I.

The burden of proof as to claims against a bankrupt estate is upon the claimant, and he is not relieved of it by the ex parte statements in his proof of claim.

It is seldom that the question as to the burden of proof arises. Ordinarily the mass of the claims presented against a bankrupt estate are shown by book entries which are admissions on the part of the bankrupts, and binding upon persons claiming under them and therefore *prima facie* evidence against the trustee. Most other claims are evidenced by writings of some kind; or they are either so small in amount, or so fair on their face, or so satisfactorily explainable, that nobody makes objection to them. If no one objects, the trustee and referee are quite justified in assuming them to be correct and allowing them. If any one objects, the claimant has no difficulty in making a *prima facie* case without oral testimony. It is to the interest of all parties to reduce the delay and expense of litigation connected with the bankrupt estate as far as possible. Purely technical or factious objections to a proof of claim are altogether improbable except when there is a contest over the appointment of a trustee. In such case it is customary for the referee (upon precedents hereinafter cited) to allow provisionally all claims except those of an unusual character which have something improbable or suspicious about them, or which, without being corroborated by any extrinsic evidence, depend wholly upon the oath of the bankrupt or some member of his family.

That this claim was regarded as belonging to the latter class is shown by the fact that it was not allowed by the referee when objected to in the preliminary proceedings, but was laid aside for further consideration.

The question as to the burden of proof therefore, which is one of the main questions involved in this appeal, is one that practically arises only in exceptional instances. The case at bar is a peculiarly illustrative one.

A claim having been put in against the firm estate, which the trustee believed to be a valid one as against the individual estate of the claimant's husband, he did not call upon the claimant to establish by legal evidence her ownership of the securities in question, but introduced sufficient evidence to show that they were used by her husband as security for his individual debts, not those of the firm—that is, he produced all of the evidence which he could possibly produce against the claim without calling any one of three witnesses, such witnesses being the two bankrupts and the claimant herself. The learned Circuit Court of Appeals remarks that a trustee "can at any time call upon the bankrupt for assistance", apparently thinking that this trustee should have subpoenaed the bankrupts in the present case; but if he had done so he would have been forced to concede that they were entitled to credence, although he might believe that no one of the three

could be believed upon oath, and although he might be provided with ample testimony to impeach them if they should take the stand in support of the claim; and *non constat* but that such a belief would have been justified. (Matter of Dresser, 13 Am. B. R., 616.)

It may be suggested that the trustee's examination of the claimant would be in the nature of a cross-examination, the affidavit being regarded as her direct examination, so that he would still be at liberty to impeach her testimony. We do not know of any authority which would make it safe to take this course; and no such argument could apply to the testimony of the bankrupts; and it is evident that the testimony of the bankrupts is the testimony upon which this case would necessarily turn. For the question of fact in the case is whether the bankrupt firm, as a firm, had guaranteed the fidelity of one of the bankrupts as bailee; and the original claim of the claimant shows that she has no present recollection of it, if (as is quite unlikely) she ever had any personal knowledge of the matter, but that her allegation was based upon information received from others.

It is of course a general principle, applicable to every form of legal or equitable procedure in courts administering the Anglo-Saxon system of jurisprudence, that a mere *ex parte* affidavit is not to be treated as legal evidence in support of the claim embodied therein, if objection is made to

the claim and the issues thereby raised are brought to trial.

It is for the appellee here to show that an *ex parte* affidavit in the form of a proof of claim under the Bankrupt Law has any higher standing in this respect than a verified bill in equity, or a verified complaint under the Code practice, or a verified claim against an estate in a probate Court.

There is nothing in the inherent nature of insolvency proceedings which would give a higher standing to *ex parte* affidavits submitted in those proceedings than is given in Courts of Probate or in other branches of the Federal Courts.

The question has come up under State insolvency laws, and so far as we are aware proofs of claim under those laws are always treated, if an issue is raised by objections filed thereto, as in the nature of pleadings, which must be supported by legal evidence if the trustee or assignee of the insolvent estate considers it advisable for the protection of the creditors that legal evidence should be called for. This has been the practice in the New York State Courts (see Matter of Jeselson, 10 Daly, 104), and was recently confirmed by the Supreme Court of Illinois in Crandall *v.* Carey-Lombard Lumber Co., 164 Ill., 474, 478, where the Court said:

"It is contended that when the claim was filed with the assignee, duly verified, the party filing exceptions had the burden of proof to overthrow the claim. The ruling of the Court below was right in requiring appellants to assume the burden of proof. If no exceptions had been filed the claim would have been allowed, but exceptions having been filed, the mere presentation of the alleged

claim so verified had no tendency to establish it and appellants were bound to prove it."

In Maryland there is no statute regulating the verification of claims in insolvency proceedings. But this same rule was recognized, the Court saying: "When a fund is distributed in a Court of Equity, if a claim is not disputed, it is always allowed by the auditor on such proof as is required for authenticating a claim in the Orphans' Court. * * * Of course, such proof is only of a primary character, and the opposing party may demand full proof if he choses to do so." (Bank *v.* Lanahan, 66 Md., 461, 468.)

The better approved practice, under the old Bankrupt Law of 1867, was to dispense with the best evidence in some instances in the preliminary proceedings, but to require it afterwards. That law contained a peculiar feature—a feature not found in the present statute—which substituted a deposition taken before an officer of the United States* for the mere affidavit or unverified pleading, known to other systems of practice.

Section 22 of that law (14 Stat., 527, see Rev. St., §§ 5076, 5079) required proofs of debt to be taken before one of the registers of the court, or a commissioner of the Circuit Court, or (if the creditor were abroad) before any minister, consul or vice-consul of the United States.

The same section (see § 5077) called the proof of claim "*a deposition* in writing" and provided that it should not "be allowed unless all the state-

*After the practice had become settled under this law the power to take depositions was extended to notaries public in 1874 (18 Stat., 186), but in other respects the practice was left unaffected.

ments set forth in such deposition shall appear to be true." It further provided (see § 5078) that the Court "may require or receive further pertinent evidence either for or against the admission of any claim"; that (see § 5080) after the proof is "satisfactory to the register" it should be sent to the assignee and registered in a book kept by him for that purpose, which should be open to the inspection of all the creditors; and that (see § 5081) the Court might "on the application of the assignee or of any creditor or of the bankrupt, or without any application" examine upon oath the bankrupt, the claimant, or anybody else concerning the matter. It appeared from this and the following section (see §§ 5081, 5085) that the proof of claim under the practice of 1867 was not regarded as complete until the register, assignee (if the assignee had then been already elected) and court all had had an opportunity to inspect it, and the Court had taken further proofs or come to the conclusion (if the taking of further proofs was requested by anybody) that they were unnecessary. Of this procedure the leading text writer said (Bump on Bankruptcy, 9th ed., p. 87):

> "The proof is neither a deposition nor an affidavit, as known in the ordinary practice of the law. It is the result of an examination made by a duly authorized officer. In no other court of justice is such testimony required for the due proof of any debt; and it is evident that Congress intended that the Court and its officers should, by a careful examination of the creditor, purge his conscience and ascertain the real nature of his claim, and that no fraud or combination, either for or against the bankrupt, exists."

Under this peculiar statute a practice arose which gave to the "deposition," although *ex parte*, a higher standing at the early stages of the proceeding than belongs to the familiar verified pleading or affidavit of claim under our other systems of procedure.

The most carefully considered case on the subject is entitled *In re* Northern Iron Co., 14 N. B. R., 356. In that case a claim was presented upon a promissory note and the register demanded that a sworn copy of the note be produced and annexed to the proof of claim. He refused to allow the claim without it. The question came up preliminarily before the election of the assignee. The case was taken to the District Judge (now Mr. Justice Brown) who affirmed the decision of the register; but in affirming the decision he said *that the filing of merely a sworn copy should be permitted only at this preliminary stage*, and that the note itself must be produced before payment of a dividend. He stated that the reason for allowing a copy to be filed preliminarily was that the original note is so often needed for the purpose of suing other parties liable thereon. The matter was appealed to the Circuit Court, whose opinion was rendered by EMMONS, J.:

> "*As a very general rule we think the register should insist upon the same degree and character of proof as that demanded in a trial at law or hearing in equity.* We do not mean to say that exceptional cases may not arise when a Register would be justified in accepting a less degree of proof for the purpose of allowing the creditor to vote for the assignee * * * *for this single purpose,*

leaving the creditor to more full evidence when the assignee was appointed.''

The same practice was followed in the Second Circuit (Matter of Knoepfel, 1 Ben., 398, Blatchford, J.; Matter of Jaycox, 7 N. B. R., 303, 310, Hall, J.).

The remarks of Judge LOWELL in the case entitled *In re* Saunders, 2 Low, 444, which might be supposed to indicate a different practice in the First Circuit, were made upon the preliminary hearing for the purpose of deciding who was entitled to vote for assignee (see his remarks *In re* Bartusch, 9 N. B. R., 478). We pressed the above cases upon the attention of the learned Circuit Court of Appeals, and cannot understand why no reference is made to them in its opinion, while it cites the lone decision to the contrary (Nixon, J., in the Felter case, 7 Fed. Rep., 904).

The Bankruptcy Act of 1898 has returned to the familiar system of pleading.

The claim is no longer evidenced by a ''deposition,'' but is a mere ''statement under oath in writing signed by a creditor'' (§ 57 *a*). These statements under oath are called ''proof of claims'' (*id.*), and a claim thus stated is said to have been ''proved,'' but it has yet to receive ''allowance'' (57 *c*). The word ''proved'' therefore does not have its more general legal significance; for under that significance of the word there could be no question of the allowance of the claim.

The procedure upon filing the so-called ''proof of claims'' is as follows (57 *d, f*):

''*d.* Claims which have been duly proved

shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

* * * * * * *

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimant will permit."

After a claim has once been allowed it "may be reconsidered for cause" under § 57 *k*, and in that case Mr. Collier is of the opinion that the burden is cast upon the person who petitions for reconsideration (Collier on Bankruptcy, 5th ed., p. 423). There is something to be said on each side of this question, and it seems to us that the rule is somewhat too broadly stated, for a claim might be reconsidered under such circumstances as would make it more proper to rehear it *de novo*, as when some suspicion of fraud might attach, or when the allowance was due to some inadvertence. This is, however, a question that is not involved in the present case, as Mrs. Dressler's claim had never been allowed, but had been "continued for cause by the court upon its own motion."

We respectfully submit that the general principle by which a person (whether trustee for others or otherwise) against whom a claim is made, has the right to have it proved under oath in open court, subject to cross examination, and without being required himself to waive his right to impeach the veracity either of the claimant or

of the bankrupts, is a sound principle and one applicable to bankrupt estates as well as to all others; that there is nothing in the present statute which indicates an intent to establish any exception to it; that it is specially applicable when the claim is presented by the wife of one of the bankrupts, and supported only by her uncorroborated affidavit—an affidavit which contradicts a prior sworn statement of the claimant herself, and is to some extent contradicted by the testimony of independent witnesses; and that it is specially applicable also when the alleged contract is one which would naturally (if not necessarily) be in writing, while no writing is filed as required by § 57 *b* of the statute.

The practice in the Second Circuit under the present Bankruptcy Law, unlike that under its predecessor, has been to the contrary, following and extending Judge Thomas' decision *In re* Sumner, 101 Fed. Rep., 224. In other circuits there seem to be no decisions upon the general question of burden of proof, but it has been held that the *onus* is heavy upon the claimant when, as here, a member of the bankrupt's family (*In re* Domenig, 128 Fed. Rep., 146; *In re* Wooten, 118 *id.* 670). The point is not touched by *In re* Shaw, 109 Fed. Rep., 780, cited below. There the question arose "what probative effect should be given to such affidavit?" Objection had been made to it, but the objection was in the nature of a *confession and avoidance*. The burden of proof was therefore upon the objector, who assumed the burden but failed to support it. Judge McPherson held that, the avoidance having failed, the claim stood confessed. Since, however, there had been a misunderstanding of the practice on the part of

the objecting party, he sent the case back again to the referee for further proceedings. Upon the rehearing (112 Fed. Rep., 947), the trustee seems to have introduced no evidence, and the claim was dismissed for inherent improbability.

Our construction of the statute is approved by Mr. Loveland (Loveland on Bankruptcy, 2nd ed., p. 341). Mr. Collier does not commit himself upon the question.

II.

Assuming the proof of claim to be sufficient upon its face, and to cast the burden of proof upon the trustee, nevertheless it should have been dismissed upon the evidence.

(*a.*) The claimant's story was shown to be false.

She pleaded in effect that certain loans were made upon her securities by Dresser & Goodrich; that *these loans* were made by certain named corporations at certain named figures; and that they were still outstanding at the time of the bankruptcy. Obviously she intended the court to infer, and although she did not say so it did infer, that the proceeds of the loans came into the hands of the bankrupt firm at its formation, in consideration of an assumption by it of the responsibility for the return of her securities.

The trustee proved, on the contrary, that *the inception of each one of these specified loans* was after the formation of the bankrupt firm, and that

each loan was obtained by claimant's husband *in his individual capacity.* The securities were not in the hands of pledgees, or of the firm, but in his hands.

It is respectfully submitted that claimant now, upon the most favorable view of her position, was called upon to produce further evidence, and amend her claim again to conform to it. As it stands, the claim is subject to the maxim *falsus in uno falsus in omnibus.* The loans described in the proof of claim being now shown to have been therein antedated, and not to have been existent at the time of the formation of the bankrupt firm, they could not have been included in its contract of assumption of its predecessor's liabilities. No other and earlier loans are pleaded. *These* loans, from these particular corporations and of these particular amounts, are the only loans that are averred to have been made upon her securities, and therefore the only ones which the court can take into consideration. Nor is there even any independent averment that the securities were in her husband's possession or control when the bankrupt firm was formed; nor does a general contract of assumption of liabilities include a guaranty to a wife that her husband will properly account to her for such of her property as may be where a wife's property presumably is— in the husband's custody.

(*b.*) The appellee below made the somewhat singular contention that the trustee had affirmatively proved the liability of the bankrupt firm for plaintiff's securities, because the original check of $35,000, representing one (and only one) of the four loans, was collected through the bank account

of the firm (p. 17). The learned court seem to have adopted this view, remarking that the indorsement indicates that the check was used in the firm's business (p. 23). There are various answers to this contention.

In the first place, the presumption is, when money is paid or a negotiable instrument made or transferred by one person to another, not that a liability is being created, but that a liability is being paid off (2 Greenleaf on Evidence, § 112; Poucher *v.* Scott, 98 N. Y., 422). The presumption therefore in the absence of any testimony upon the point is that Dresser had owed his firm $35,000, and paid off the debt in this way.

This presumption was reinforced by the fact that the firm was not a party to the note given in renewal of this loan (p. 12). If the original note was for a firm indebtedness, naturally the firm would have appeared as maker or endorser of the renewal note. There are various common motives for a partner endorsing a note into the firm account. He may be paying an indebtedness to the firm, as the law presumes; or he may be loaning moneys to it as its individual creditor, in which case he is postponed to the other creditors (p. 28, *infra*); or he may be making a contribution to capital, in which case he is of course similarly postponed; or he may be, as is so common, using his firm account as a convenient place of deposit for his individual funds.

It is an "erroneous but popular notion" (1 Lindley on Partnership, 189) that the firm estate becomes liable if money is borrrowed by an individual partner upon his own credit for the benefit of the firm. The law is well settled to the contrary (*Id.* and 2 *id.*, 703, 721). Hence, even if the

learned court's inference of fact were admissible, it would not affect the result. The authorities are in unison upon this point (LeRoy *v.* Johnson, 2 Pet., 186; Jaques *v.* Marquand, 6 Cow., 497, 503; National Bank of Salem *v.* Thomas, 47 N. Y., 15, 19-20). Among the authorities cited in the last mentioned case is Bevan *v.* Lewis, 1 Sim. 376, which was a bankrupt case. The creditor of the individual partner, the moneys loaned having gone for the benefit of the firm, was held to stand in his debtor's shoes and to be postponed to the firm creditors. Lord Hardwicke held in a similar case (*Ex parte* Hunter, 1 Atk., 143) that the creditor of the individual partner had no direct claim in bankruptcy, but that "by way of security he is entitled as standing in the place of that partner who has paid the money to the use of the partnership trade." It does not appear whether he was postponed to the other creditors, but the decision was so interpreted in the Jaques case *supra;* and if this be not the correct interpretation, it has been to that extent overruled (See 2 Lindley, 721; Read *v.* Bailey, L. R., 3 App. Cas., 94, 101).

(*c*) Even on claimant's own story, is there any allegation of a valid contract by the firm to guarantee to the claimant her husband's liability *as bailee* of her bonds and stocks? He had borrowed those bonds and stocks long ago, for the benefit of another firm, if the allegations of the amended claim be true. He had subsequently received individually all of the assets of that firm, including those obtained upon the pledge of these securities, so that there was full consideration for *his* agreement to assume, among its other liabilities, this one. The allegation as to the survival

of these liabilities at the time when he succeeded to the business of the old firm is not repeated when the affiant's narrative reaches the time of the organization of the new firm; nor is it alleged that the new firm succeeded to any assets obtained by means of the use of any of her securities. The learned court below say, indeed, that this "is evidently due to a clerical omission", and supply the omission by an amendment without any proof to support it. We respectfully submit that this is indefensible. The trustee had the right to act upon the affidavit as it was, not as it might have been, and to assume that when after six months' consideration it had been amended to suit her counsel, it was as strong as claimant was willing to swear to; and certainly that it would not be received as evidence of what it did not state.

It is conceivably possible, however queer, that the new firm might promise Dresser that it would guarantee to his wife the return of her securities. Such a promise might conceivably be written or oral.

If written, however the instrument evidencing it must be filed with the proof of claim, or a statement that it was lost or destroyed must be filed therewith (§57 *b*). We submit therefore, notwithstanding the ruling below to the contrary, that a claimant who neither files a writing nor accounts for its non-production must be presumed to have had none.

The contract, if oral, would have been invalid. The Statute of Frauds of New York State avoided every oral "special promise to answer for the debt, default or miscarriage of another person" (2 N. Y. Rev. St., 135, §2). This would not be a promise to answer for the *debt* of another, be-

cause Dresser at the time of the alleged promise was not a debtor but a bailee. It would, however, be a promise to answer for his *default* or *miscarriage* (Browne on the Statute of Frauds, 5th ed., §155). The practice of whittling down the Statute ceased long ago (White *vs.* Rintoul, 108 N. Y., 222; Browne, §§212, 214*a*). The cases cited by the learned court below are regarded by it as in point only because of unwarranted assumption, without averment or proof, that the firm made an original contract, upon consideration of assets received through the use of these securities.

Claimant argued below that, as under the New York Code practice, it was necessary for us to plead the statute. But the law is well settled to the contrary. (May *v.* Sloan, 101 U. S., 231; Dunphy *v.* Ryan, 116 U. S., 491; Reed on the Statute of Frauds, §521).

(*d*) Assuming, however, that there was a valid contract by the firm to guarantee to the claimant her husband's liability as bailee of her bonds and stocks, still she can not claim as a firm creditor.

It will be noticed that Mrs. Dresser does not claim any contract to have been made *with her.* She merely sues upon an alleged assumption of this liability, made in an alleged contract between Daniel Le Roy Dresser of the first part and Dresser & Co. of the second part.

This contract she says she knew of and consented to; but she does not claim to have been a party to it.

Her right to recover upon it, therefore, arises upon the equitable principle of *subrogation.*

The theory was fully set forth in the opinion of Mr. Justice Gray in the leading case of Keller *v.* Ashford, 133 U. S., 610, 622-6, and in the New Jersey case so extensively quoted in that opinion; and is illustrated also by Johns *v.* Wilson, 180 U. S., 440, 447; Sayward *v.* Dexter Horton & Co., 72 Fed. Rep., 758; Goodyear Co. *v.* Dancel, 119 Fed. Rep., 692, 695; Green *v.* Turner, 80 Fed Rep., 41, 43. The doctrine is clearly stated by Judge Thayer in Knapp *v.* Conn. Mutual Life Insurance Co., 85 Fed. Rep., 329, 331-2 (C. C. A.), where, after showing the general rule to be that the right of the third party to sue in the analogous case of the assumption of a mortgage debt by a grantee of real property is founded upon the fact that "the mortgagor, with respect to his grantee, is merely a surety for its payment," he proceeds as follows:

> "Such being the relation existing between the mortgagor and his grantee it is held that the mortgagee may be *subrogated to the rights of the mortgagor*, and, by a suit in equity for that purpose, may compel the grantee to keep his enagagement with the mortgagor by paying the mortgage debt. But as the right which the mortgagee thus acquires by virtue of the agreement of a third party with the mortgagor to pay the mortgage debt is purely equitable, and does not rest on privity of contract, it will not be enforced, if, for any reason, the contract between the mortgagor and his grantee could not be enforced by the former in a suit at law. *If reasons exist which would enable the grantee to successfully defend an action brought by the mortgagor for nonpayment of the mortgage debt, the same reasons will preclude the mortgagee from en-*

forcing his equitable right'' (citing authorities).

The point decided in the New Jersey case above referred to (Crowell *v.* Currier, 27 N. J., Eq. 152, 154, 156; s. c. *Id.*, 650, 652-6), the able opinion of the Vice Chancellor in which was unanimously affirmed by the Court of Errors and Appeals after argument by leading counsel, was that the mortgagee can no longer sue upon a covenant of assumption after the covenantor has reconveyed to the mortgagor, since the mortgagee can then no longer himself sue upon it. The principle is also succinctly and clearly stated by Chief Justice Gray in Coffin *v.* Adams, 131 Mass., 133. It is said by this court in Episcopal City Mission *v.* Brown, 158 U. S., 222, 227, and Willard *v.* Wood, 164 U. S., 502, 521, that the mortgagee has only the rights of the mortgagor in such a case, and therefore can assert only such cause of action, legal or equitable, as the mortgagor might possess.

Applying to the case at bar the doctrine thus stated, which seems to be a necessary corollary to the proposition that the original creditor's right is based upon the principle of subrogation, we find that Dresser could not have sued his firm upon this alleged assumption agreement. Whatever may have been the state of things when the bankrupt firm was formed and the assumption agreement is averred to have been made, the situation at the time of the bankruptcy was that these securities were all being used by him for his individual purposes. He could not have claimed against the firm.

It is therefore respectfully and confidently submitted that his wife is in the same position, and

that whatever claim she may have had, when (if ever) her securities stood pledged for loans whose proceeds were being used by the firm, had lapsed.

It is true that the transaction occurred in the State of New York, and that the rule in the cases above cited was disavowed in that State in Gifford *v.* Corrigan, 117 N. Y., 257, 264 (Danforth and Peckham, JJ., dissenting), a decision since followed in the State (New York Life Insurance Company *v.* Aitkin, 125 N. Y., 660, 670). This result was reached by substantially abandoning the doctrine of equitable subrogation, although that doctrine is recognized in a long line of New York cases as the basis of the right to sue (Burr *v.* Beers, 24 N. Y., 178, 179; Garnsey *v.* Rogers, 47 N. Y., 233, 237; Vrooman *v.* Turner, 69 N. Y., 280, 282; Pardee *v.* Treat, 82 N. Y., 385, 292; Wager *v.* Link, 134 N. Y., 122, 126), and although the court had recognized the right to sue as a "derivative" one, under which the party suing has no higher right than that of the promisee in the assumption agreement (Dunning *v.* Leavitt, 85 N. Y., 30, 35).

The case at bar does not affect the title to or any lien upon New York real estate. It is averred as arising upon an ordinary commercial contract. It is a case therefore in which it is open to the Federal courts to enforce their own views of the law (Swift *v.* Tyson, 16 Pet., 1, and cases following it). Nor is the question one as to the form of remedy. It is a question of substantial right.

It is respectfully submitted that the rule generally prevailing in other States and in the Federal courts, and not the present New York rule, is the one which is correct and should be adopted.

Even were this otherwise, however, and were Mrs. Presser's claim still existent, it is a deriva-

tive one even upon the New York theory. She stands in her husband's shoes, and it follows that she is postponed to the creditors of the firm; for it is well settled that her husband could not have claimed in competition with firm creditors, even though he had contributed the securities to the capital of the partnership or used them for its benefit (2 Lindley on Partnership, 721-2; Matter of Rieser, 19 Hun, 202, aff'd 81 N. Y., 629; Wallerstein *v.* Ervin, 112 Fed. Rep. 124, C. C. A.; Goldthwaite *v.* Janney, 102 Ala., 431, 439).

The position of the claimant comes down to this:

She lent certain securities to her husband for the purpose of borrowing money on them. She believes some of them were used by his prior firm. The securities or their proceeds came into the hands of her husband on the dissolution of the old firm. They remained in his possession and the securities are now pledged for his individual debts.

She has thus paid part of his debts with her securities, but now, although standing at best in the shoes of his individual creditors, she seeks to come in among firm creditors.

It may be suggested that this question would not necessarily arise upon allowance of the claim, but only upon application of the claimant thereafter for a dividend; but it was decided in the present form of proceeding in the Wallerstein case, *supra*, and the Referee has held it to be involved upon the present appeal (Matter of Dresser & Co., 14 Am. B. R. at p. 42).

III.

The claim thus ranks as an individual claim against Daniel LeRoy Dresser, and therefore cannot be proved as against the partnership estate.

As it has not been offered against the individual estate, and the time for presenting claims has expired, we might possibly take the point that it cannot be presented at all; but, as we understand it to be a valid claim as against the lady's husband, we would not oppose a provision in a judgment of reversal to the effect that the claim may be amended so as to be presented against the proper party, or permitting the proof in analogy with § 57 *n*, if the court deems itself to have jurisdiction to so direct.

It is respectfully submitted that the decree should be reversed and the claim dismissed.

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